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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE, Plaintiff and Respondent, v. LAVELLE CAROL RICHARDSON, Defendant and Appellant.	C061567 (Super. Ct. No. 08F008)

A jury convicted defendant Lavelle Carol Richardson of making a criminal threat. (Pen. Code, § 422.)[1] The trial court suspended imposition of sentence and placed defendant on probation for three years. Defendant appeals, contending (1) insufficient evidence supports her conviction of making a criminal threat, and (2) the trial court erred by failing to instruct on the lesser included offense of attempted criminal threat. (Pen. Code, §§ 664, 422.) We shall affirm the judgment.

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[1] Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Case

Since 1999, Susan Williams has worked as a librarian at the Hayfork branch of the Trinity County Library. In 1997, she served as the branch's head librarian and had responsibility for answering the telephone.

In May 2007, Williams met Josh Richardson when he came into the library to use its computers. In July 2007, Williams met defendant when she came into the library looking for Richardson. Defendant told Williams that she was Richardson's sister from Iowa and was hoping to surprise him. In reality, defendant was in the process of divorcing Richardson. Williams told defendant that she was not allowed to disclose the whereabouts of any library patron. Defendant went off in search of Richardson.

In August 2007, Williams began dating Richardson even though his marital dissolution was not yet complete.

During the first week of January 2008, defendant called Williams at work to tell her that Richardson "was a bad person and that he would take [Williams] for everything [she] had." Defendant invited Williams to come to the upcoming divorce proceeding. Williams responded that she was not going to attend. The conversation was civil and lasted only about 20 seconds.

Shortly before 1:00 p.m. on January 22, 2008, Williams answered the telephone at work. As was her custom, Williams answered: "Hayfork Library, this is Susan." Defendant angrily announced, "[T]his is Lavelle." Then defendant told her:

"You and Josh can both be taken care of, I do have his gun. I can take care of the both of you while you sleep. Or, get you when you get off work when it's dark. I am watching the both of you. I have connections in Hayfork that tell me what you and Josh are doing. So, be warned that this is not over with. I will not just let Josh go peacefully, as he as [*sic*] found out. I will continue to lurk in the shadows and disrupted [*sic*] both your lives. I will do whatever I have to do to make Josh pay and you will pay also. Neither of you can hide from me." (First "*sic*" added.)

Defendant became angrier as she spoke and ended up yelling at Williams. When defendant finished, she hung up on Williams. Williams had not said a word during defendant's 30-second rant.

After the call, Williams was upset and feared that defendant would shoot her. Richardson had previously told Williams that defendant possessed guns. After work, Williams called Richardson to confirm that defendant had guns in her possession. Richardson told her that defendant had inherited a rifle and a few guns from her father.

The next morning, Williams went to work and typed a statement that recounted what defendant had said during her threatening telephone call. Williams then learned that an anonymous complaint had been made against her that same morning. Around 4:00 p.m., Williams contacted the police.

Sheriff's Deputy Ron Hanover responded to the Hayfork branch library. Williams gave the deputy a copy of her typed notes regarding what defendant had said on the telephone.

Williams explained that she feared for her life because she believed defendant would carry out the threat to shoot Williams.

After talking with Williams, Deputy Hanover called defendant about the threat reported by Williams. Defendant responded defensively, denying that she knew Williams or made any threatening telephone call. Defendant stated that she did not know anyone in Hayfork. The deputy explained that Williams worked at the Hayfork Library and was dating Richardson. At that point, defendant admitted knowing Williams but denied threatening her.

A few minutes after Deputy Hanover ended his call to defendant, she called him back to report that "they" had threatened her. Defendant declined to identify who "they" were. Defendant also refused to describe the threats. Instead, she concluded: "[W]ell, it don't really matter. I just want them to leave me alone." Defendant hung up on the deputy.

On January 24, 2008, Williams filed an application for a restraining order against defendant because she feared for her safety. Even at trial, Williams professed to being afraid of defendant.

Defense Case

The defense called Daryl Danenhauer as its sole witness. Danenhauer testified that he had been friends with defendant for more than 40 years. He stated that defendant was living in Turlock, California, in January 2008. On January 22, 2008, Danenhauer spent the entire day with defendant. Sometime between noon and 1:00 p.m., Danenhauer observed defendant call

the Hayfork library on her cell phone. Defendant told him she was calling the library to locate Richardson to ask about filling out divorce papers. Danenhauer overheard the conversation and testified that defendant did not threaten anyone. Instead, defendant merely asked whether Richardson was there. After a slight pause, defendant said that "it doesn't matter," and she hung up.

DISCUSSION

I

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence supporting her conviction of making a criminal threat. Specifically, defendant argues that the prosecution failed to prove that the threat was *immediate and unequivocal*. Defendant also challenges the sufficiency of the evidence that Williams experienced *sustained fear* as a result of the threat. We reject the contentions.

A

As the California Supreme Court has explained, "'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 61 L.Ed.2d 560.) We apply an

identical standard under the California Constitution. (*Ibid.*) 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)" (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

The testimony of a single witness suffices to support a factual finding unless the testimony is inherently improbable or physically impossible. (*People v. Young, supra,* 34 Cal.4th 1149, 1181.) When the evidence supports the conviction, we will not disturb the judgment even if the other evidence presented at trial might have supported an acquittal. (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

B

Section 422 prohibits the issuance of criminal threats. In pertinent part, the statute provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby

causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

In assessing "whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat a challenge," we consider the defendant's statement in light of "all the surrounding circumstances." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.)

Here, the record shows that substantial evidence supported the jury's conviction of defendant for issuing a criminal threat against Williams. Defendant told Williams that she had a firearm. Defendant then sought to instill fear by articulating scenarios by which she could "take care of" both Williams and Richardson: while they were sleeping or when Williams got off work and it was dark outside. Defendant explained that she would "continue to lurk in the shadows" to prevent Williams and Richardson from hiding from her. To emphasize her commitment to making Williams and Richardson "pay," defendant stated she would "do whatever [she had] to do."

Defendant's statements sufficed to convey a gravity of purpose and immediate prospect of execution of a threat to inflict great bodily injury or death on Williams. Defendant's emphasis on her possession of a gun indicated a means by which she could severely injure or kill Williams. Contrary to

defendant's assertion, there was nothing remote or conditional about the threat. Defendant implied that she had already been stalking Williams by stating she would *continue* to lurk in the shadows. Defendant also noted that she would not allow Williams or Richardson to "go peacefully" but intended to make sure they would "pay." In the context of a threat emphasizing possession of a gun, defendant conveyed a determination and means of inflicting injury that supported a conviction of section 422. (*People v. Mendoza*, *supra*, 59 Cal.App.4th at pp. 1341-1342.)

Defendant's contention that the evidence failed to prove Williams experienced sustained fear lacks merit. Williams testified that she became afraid upon hearing defendant's threat. She remained sufficiently afraid to call Richardson a few hours later to check whether defendant actually possessed guns. The next day, she called the police to report the threat. Deputy Hanover testified that Williams said that she feared for her life. Williams then applied for a restraining order against defendant based on her fear that defendant would hurt her. More than a year after the threat, Williams still feared defendant.

The evidence showed that Williams took defendant's threat seriously. That Williams did not call the police until the day after the threat does not negate her testimony that she remained in fear for her life. Section 422 does not require a victim to be so paralyzed by fear that he or she is unable to function in any way other than to immediately call the police. An apprehension for victim's personal safety or the safety of his or her family that is more than momentary or fleeting satisfies

the fear element of section 422. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1024.) Evidence of a long-lasting fear for one's life -- such as that presented by Williams's testimony -- suffices for a conviction of criminal threat.

II

Failure to Instruct on the Lesser Included Offense of Attempted Criminal Threat

Defendant argues that the trial court erred in failing to instruct sua sponte on the lesser included offense of attempted criminal threat. In so arguing, defendant reiterates her contention that the evidence of Williams's sustained fear was weak. We are not persuaded.

A

A trial court has a duty to instruct the jury on any offense "necessarily included" in the charged offense if substantial evidence lends support for the lesser crime's commission. (*People v. Birks* (1998) 19 Cal.4th 108, 112.) As the California Supreme Court has explained, "a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Id.* at pp. 117-118.) "This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence." (*Ibid.*)

Even in the absence of a request for an instruction on the lesser included offense, the trial court must give the instruction if a reasonable jury might find the evidence of the lesser offense persuasive. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) However, "the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

In assessing a claim of failure to instruct on a lesser included offense, "we review independently the question whether the trial court failed to instruct on a lesser included offense." (*People v. Cole*, *supra*, 33 Cal.4th at p. 1215.)

B

Attempted criminal threat is a lesser included offense of criminal threat. (*People v. Toledo* (2001) 26 Cal.4th 221, 226, 230.) In *Toledo*, the California Supreme Court explained that a person commits an attempted criminal threat "if a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Id.* at p. 231.) Defendant contends that the evidence that Williams experienced sustained fear was "comparatively

weak" so that the trial court had a duty to instruct sua sponte on attempted criminal threat.

As we have explained, Williams's testimony amply satisfied the sustained fear element of section 422. Williams described her fear as starting from the time of the threatening telephone call, extending through her call to Richardson that afternoon, and enduring through her call to the police the next day. Even though trial took place more than a year after the threat, Williams still feared defendant as a result of the call. Thus, Williams endured fear of defendant for "a period of time that extend[ed] beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) The evidence regarding the element of fear was not sufficiently weak to require the trial court to instruct on attempted criminal threat.

C

We would affirm the judgment even if the trial court had erred in failing to instruct on attempted criminal threat because it is not reasonably probable that a result more favorable to the defendant would have occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) The evidence did not support a conclusion that Williams had been threatened but did not actually experience sustained fear as a result.

Defendant's theory at trial was that she did not threaten Williams at all. The defense introduced Danenhauer's testimony to prove that defendant had been civil and nonthreatening during her January 22, 2008, telephone call to the Hayfork library.

Defense counsel's closing argument focused on portraying Williams as untruthful about being threatened. The jury was presented with the choice of accepting or rejecting the entirety of Williams's testimony. The evidence did not allow for a conviction for attempted criminal threat. Accordingly, the trial court did not err in failing to instruct on the lesser included offense.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

NICHOLSON, J.

RAYE, J.